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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

UNITED STATES OF AMERICA *ex rel.* BENJAMIN POEHLING, Plaintiffs, v. UNITEDHEALTH GROUP, INC., *et al.*, Defendants.	No. CV 16-08697 MWF (SSx) UNITED STATES' AND RELATOR BENJAMIN POEHLING'S CONSOLIDATED OPPOSITION TO UNITED'S MOTION TO TRANSFER Hon. Michael W. Fitzgerald Hearing Date: September 25, 2017 Hearing Time: 10:00 a.m. Courtroom: 5A

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I. INTRODUCTION

The United States and Relator Benjamin Poehling respectfully request that this Court deny defendants' motion to transfer under 28 U.S. C. § 1404(a). The United States filed its Complaint-In-Intervention in this District because venue is proper here, convenient for numerous witnesses, and allows for intra-district coordination with a related action in this District against the same defendants involving the same type of fraud on the Medicare Program.[1] In addition, this District is the factual center of much of the conduct at issue in this case arising under False Claims Act, 31 U.S.C. §§ 3729-3733 ("FCA"). The genesis of United's Chart Review Program, which is at the heart of this FCA case, was in this District. United's other programs relating to the billions of dollars in payments it has obtained from the Medicare Program were, in significant part, designed, managed, and conducted here. A review of the facts at issue shows that keeping this action in this District serves the ends of justice.

Most importantly, United's motion does not come close to countering the substantial weight to be accorded the United States' decision to file this FCA case in this District. United does not argue that venue in this District is improper, let alone establish that venue in the District of Columbia would be significantly more convenient. In fact, it would not be more convenient. There are at least eight key witnesses who reside in or near California and many additional important witnesses who reside in or near California. *See* Declarations of Carol Wallack (hereinafter "Wallack Decl.") and Maria Marsh (hereinafter "Marsh Decl."), filed herewith. These key witnesses and some, if not many, of the other important witnesses who are likely to be called to provide important testimony at trial, many of whom are third-parties, reside in or near California. Furthermore, the current federal government employees with knowledge relevant to this action will not be inconvenienced by traveling to this District to provide testimony. Such travel is part of their job responsibilities and the United States recognizes that, by

[1] The related action is *United States ex rel. Swoben v. Secure Horizons*, No. 09-5013 JFW (C.D. Cal.) (hereinafter "*Swoben*").

filing this action in this District, it has consented to its employees traveling to this District to provide testimony at trial. The three former government employees who reside in or near Washington D.C., and have been identified by United as being key witnesses, have authorized counsel for the United States to represent to this Court that they would not be inconvenienced by traveling to Los Angeles to provide testimony in the event of a trial. *See* Wallack Decl. ¶ 2.

In addition, transferring this action to the District of Columbia for coordination with United's Administrative Procedure Act ("APA") challenge would be fruitless. In Judge Collyer's recent decision declining to stay the APA case in light of this and the *Swoben* FCA actions, she concluded that the decisive legal issues are very different. United does not dispute, and Judge Collyer found, that the administrative rule at issue in the APA case is *not* at issue in this FCA action and, further, that United's conduct at issue in this case and the related *Swoben* FCA action in this District are *not* at issue in the APA case.[2] Based on these differences, Judge Collyer concluded that:

> it is highly unlikely that a future decision in the FCA Cases would address, much less resolve, the APA challenge here. Similarly, any decision in this matter will not answer the most relevant questions in the FCA Cases. Whether a government contractor knowingly engaged in fraud, and whether a government agency appropriately promulgated a rule several years later, are simply too different from one another to warrant a stay, even if such lawsuits may touch upon similar questions of statutory interpretation.

Id., 2017 WL 2623783, at *3. And, according to Judge Collyer, "the fact that the same parties are in all three actions is only a distraction" because "United's alleged behavior

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[2] *UnitedHealthcare Ins. Co. v. Price*, 2017 WL 2623783, at *2 (D.D.C. June 14, 2017) (hereinafter "*UnitedHealthcare*") (stating that "[a]ll parties [including United] agree that the allegedly fraudulent conduct in *Poehling* and *Swoben* predates the 2014 Overpayment Rule, and that the Rule is not at issue in either FCA Case" and that the APA case does not "concern the actions of United in any way"). Judge Collyer explained that the APA review would be limited to the administrative record and finding that "[a]ny factual record developed in the FCA Cases would have very limited relevance, if any, to this APA review of the 2014 Overpayment Rule." *Id.*

in the FCA Cases is distinct from [the government's] actions in promulgating the 2014 Overpayment Rule." *Id*.

Moreover, as noted by Judge Collyer, the factual records upon which this case and the APA case will be decided are also not the same. An APA challenge does not involve discovery and is resolved on the agency's rulemaking record, not through a trial with live witnesses. As Judge Collyer further explained:

> The two FCA Cases [this action and *Swoben*] will require considerable discovery and take much longer to bring to conclusion. In stark contrast, the 2014 Overpayment Rule will rise or fall on the administrative record that preceded it. The relevant facts and legal standards will be entirely different.

Id. at *3. There is no reason to believe that Judge Collyer's conclusions would change if United tried to coordinate this FCA action with the APA case. This is especially true given that the parties to the APA action have proposed to Judge Collyer a plan to resolve that action by cross-motions for summary judgment to be fully briefed by January 2018.[3] At that time, this action will be in an early phase of discovery.

Finally, there is no merit to United's argument that this case should be transferred from this District because United was not consulted about the transfer of this action from the Western District of New York. First, the argument does not aid United in meeting its substantial burden of overcoming the deference that must be shown to the United States' decision to file its action here. Moreover, United's argument has nothing to do with whether the District of Columbia is a significantly more convenient forum (which it is not). United's argument that the transfer occurred *ex parte* is also plainly wrong because it was not a party to this action until after it was served with the United States' Complaint-In-Intervention, at which time this action had already been in this District for half a year. Because United was not a party when the action was transferred, the district

[3] On August 11, 2017, United and the United States lodged this proposed order in the APA action as Docket No. 43-1. Judge Collyer has yet to file the proposed order.

court in the Western District of New York had no obligation to consult with United and neither did the United States. And, even if United had been consulted, it is speculative and presumptuous for United to assume that the Western District of New York would have transferred this action to the District of Columbia, especially considering that there is a related action and numerous witnesses in this District.

II. BACKGROUND

A. The FCA *Qui Tam* Actions

Contrary to the assertions in United's brief, the FCA claims in this action and *Swoben* are not based on United's failure to implement an effective compliance program or to exercise due diligence in identifying overpayments. While United failed to do both, its conduct at issue in these FCA actions was far worse: it was fraud. United knew (or deliberately or recklessly disregarded information showing) that it had submitted invalid diagnostic data to the Medicare Program – data upon which Medicare risk adjustment payments are based – and that the false data resulted in it receiving billions of dollars of risk adjustment payments to which it was not entitled. United knowingly and improperly failed to delete or withdraw the invalid diagnoses that it had previously submitted to Medicare for payment. At the same time, United concealed its fraud and falsely attested to the government in writing that the diagnoses it had submitted were accurate and truthful. A fuller explication as to why this conduct results in liability under the FCA is set forth in the Ninth Circuit's opinion in *United States ex rel. Swoben v. United Healthcare Ins. Co.*, 848 F.3d 1161, 1172-79 (9th Cir. 2016).

As alleged in the Third and Fourth Amended Complaints, the *Swoben* action involves wrongful conduct virtually identical to the conduct in this case. Both actions involve what are referred to as "one-sided" chart reviews or chart reviews that fail to "look both ways." 848 F.3d at 1170-71 (describing Swoben's allegations that United conducted one-sided chart reviews). *Compare* United States' Complaint-In-Partial-Intervention in *Swoben* (*Swoben*, Docket No. 296) ¶¶ 8-9 (alleging that United violated the FCA by failing to "look both ways" at the results of its chart reviews) *with* United

States' Corrected Complaint-In-Partial-Intervention in this case (*Poehling*, Docket No. 120-1) ¶¶ 9-12 (same).[4] These were reviews of beneficiaries' medical records conducted by United for the sole purpose of submitting additional diagnoses to the Medicare Program to increase the amount of risk adjustment payments that it receives from the Program. These reviews were blind, *i.e.*, the reviewers did not know which diagnoses, if any, were reported by the physicians to United. The coders were instructed to identify all diagnoses supported by the beneficiaries' medical records. Accordingly, the results of the reviews were often negative as well as positive in that they showed which diagnoses reported by the physicians were unsupported by their medical records and, thus, invalid. But, United did not "look both ways" at the results and thus did not delete or withdraw the diagnoses that it previously submitted to the Medicare Program and were unsupported and invalidated by its reviews of the beneficiaries' medical records.

Swoben was the first action to be filed against United and it was filed in this District. In 2010, Swoben amended his complaint to add United as a defendant and assert allegations about its "one-sided" chart reviews. In 2011, Swoben added a count to his complaint that focused on United's "one-sided" reviews of charts for its beneficiaries who were patients of a large provider group in this District called HealthCare Partners ("HCP"). In 2013, in response to a motion to dismiss, Swoben proposed adding allegations to support his claims relating to United's one-sided chart reviews of HCP's patients. The district court denied Swoben's request and dismissed his action. Swoben appealed, and the Ninth Circuit reversed and remanded, holding that Swoben should

[4] United quotes liberally from a Consolidation Decision in the *Swoben* case, which United itself drafted and repeatedly uses out of context. *See, e.g.*, Def. Br. at 7-8. Judge Walter denied *without prejudice* the United States' motion to consolidate this action and *Swoben* because he believed it was premature. Judge Walter did not conclude that *Swoben* and this case were unrelated. Minute Order filed Apr. 27, 2017 (*Swoben* Docket No. 294) at 1 (denying motion "**without prejudice** to a new motion to consolidate") (emphasis in the original). Furthermore, the need to coordinate discovery in the two FCA cases is now quite obvious. On August 24, 2017, United served the United States with its first set of document requests in this action, which includes 78 document requests. Most of those requests were also included in United's two sets of document requests that it served on the United States in *Swoben*.

have been allowed to amend his complaint, because he articulated "a cognizable legal theory" under the FCA. 848 F.3d at 1176, 1184.

Relator Poehling filed his action against United in 2011. Poehling alleged the same wrongful conduct as in *Swoben* – that is, United disregarded the negative results of its blind chart reviews and failed to delete invalid diagnoses – although his allegations were broader in that they implicated United's national Chart Review Program, involving millions of chart reviews. In addition, Poehling's complaint included other factually distinct allegations giving rise to the same type of FCA liability. For example, Poehling alleged that United developed a Risk Adjustment Coding and Compliance Review ("RACCR") Program, pursuant to which United reviewed the medical records of large financially-incentivized provider groups (like HCP) to determine if the diagnoses they reported were supported by their medical records. Poehling alleged that United purposefully designed RACCR to make it appear as if it were addressing inaccurate coding (also known as "over-coding") by these large provider groups, but in reality, United did virtually nothing to address the problem.

In November 2016, when the United States saw that it was unlikely that the *Poehling* action would be resolved pre-intervention, it decided to move to transfer the action because the Western District of New York was an inconvenient forum. The United States requested a transfer to this District because significant conduct at issue occurred here and there are numerous witnesses here.[5] The United States also believed that it was obligated to avoid burdening two different district courts any further than necessary with very related FCA cases against the same defendant, once litigation became inevitable. Judge Richard Arcara in the Western District of New York agreed and issued an Order on November 8, 2016, transferring this action to this District.

[5] Transfer to the same district of related *qui tam* actions against the same defendant is also an accepted statutory procedure used to resolve potential disputes over application of the FCA's first-to-file provision under 31 U.S.C. § 3730 (b)(5). At the time the United States moved to transfer this action, there was a potential for such a dispute, although that potential no longer exists.

Moreover, because *Poehling* and *Swoben* involve common questions of fact and law, Judge Arcara's Order suggested that this Court should consider whether this action should be deemed related to the *Swoben* action. Order filed Nov. 8, 2016 (Docket. No. 50) at 2.

B. The United States' Complaints In the FCA Actions

After the *Swoben* action was reversed and remanded, the United States intervened and filed its Complaint in that action. That Complaint focuses on United's failure, during the 2005 to 2014 time period, to "look both ways" at the negative as well as positive results of the blind chart reviews of HCP's patients. The United States alleges in *Swoben* that, since at least 2005, United has funded the cost of the chart reviews of HCP's patients enrolled in United's California Medicare Advantage ("MA") Plan by paying a coding vendor to perform the reviews or by paying HCP to perform the reviews. *Swoben* Compl. ¶ 8. It further alleges that United conceived of and directed these one-sided chart reviews. *Id*. The factual allegations in *Swoben* also show that this District is the factual center of the conduct at issue in that case for some of the same reasons it is a factual center of the conduct at issue in this action. For instance, both actions focus on the knowledge of some of the same key witnesses who worked for PacifiCare Health Systems ("PacifiCare") and its California MA Plan, which were located in this District, both before and after United acquired them in 2005. *Compare Swoben* Compl. ¶¶ 16, 21-22, 64-77, 80-82, 85 *with Poehling* Compl. ¶¶ 28, 33-34, 81-85, 88-94, 96-97, 99, 101, 103. Both actions also involve HCP, one of the incentivized providers involved in United's RACCR Program. *Compare Swoben* Compl. ¶¶ 6-8, 62, 72, 76, 77, 87, 91-107 *with Poehling* Compl. ¶¶ 215, 220 and Exhibit 4 thereto.

In 2017, several months after this action was transferred to this District, with no additional progress on an out-of-court resolution of this matter, the United States intervened. Pursuant to an Order issued by this Court in February 2017, the United States filed its Complaint in May 2017. The United States' Complaint includes approximately fifty pages of detailed factual allegations demonstrating United's FCA

liability for its "look one way" national Chart Review Program and for avoiding repaying Medicare for invalid diagnoses reported to it by its financially-incentivized providers. The Complaint describes United's knowledge that many provider-reported diagnoses were invalid and that it was obligated to undertake good faith efforts to identify and delete them, *Poehling* Compl. ¶¶ 81-120; United's "look one way" Chart Review Program, *id*. ¶¶ 121-134; United's knowledge that it was obligated to look both ways at the results of its chart reviews and delete invalid diagnoses, *id*. ¶¶ 135-152; United's short-lived "look both ways" Claims Verification Program, *id*. ¶¶ 153-193; and, United's failure to delete at least over a billion dollars of diagnoses invalidated by its own Chart Review Program, *id*. ¶¶ 194-197. The Complaint also describes United's Internal Data Validation ("IDV") and RACCR audits and how United knowingly and improperly avoided repaying Medicare for invalid diagnoses reported by its financially-incentivized providers. *Id*. ¶¶ 198-229. In addition, the Complaint describes the false Risk Adjustment Attestations that United submitted to the Medicare Program in order to obtain risk adjustment payments. *Id*. ¶¶ 230-233. The same attestations are at issue in the *Swoben* action and are discussed at length in the Ninth Circuit's opinion in that case.

C. The Administrative Procedure Act Case

In January 2016, United filed its APA case in the District of Columbia. United seeks review of a regulation promulgated by the Centers for Medicare and Medicaid Services ("CMS") in 2014 and codified at 42 C.F.R. § 422.326 (the "Overpayment Rule"). This regulation applies to Medicare Advantage Organizations ("MAOs"), such as United, and specifies how MAOs should comply with their statutory obligation to report and repay overpayments pursuant to 42 U.S.C. § 1320a-7k(d), enacted as part of the Patient Protection and Affordable Care Act of 2010. In the APA action, United claims (incorrectly so) that the rule imposes a stricter standard regarding the validation of payment data on MAOs than on the Medicare Program itself when the Program pays providers based on services rendered (not diagnoses) under the fee-for-service parts (Parts A and B) of the Medicare Program and, thus, that the rule violates the APA.

Earlier this year, the United States requested that the district court stay the APA action. But the United States did not ask to consolidate or otherwise coordinate the APA action with the FCA cases because there is no reason for consolidation or coordination. Significantly, United opposed the motion for a stay, asserting that "these cases may never address any common legal issues." United's Opp'n to Mot. To Stay at 2 (Docket No. 31 in the APA action). As stated, the district court denied the request for a stay.

III. ARGUMENT

A. United Has A Heavy Burden In Establishing That The District Of Columbia Is A More Convenient Forum In Order To Overcome The Deference To The United States' Decision to File Its Complaint Here

The crucial factors determining whether this action should be transferred focus on convenience of witnesses and the interest of justice. 28 U.S.C. § 1404(a). The Ninth Circuit prescribes an "individualized, case-by-case determination of convenience and fairness to determine whether the case should be transferred." *See Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000) (*citing Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988)); *accord O.S. Sec. LLC v. Schlage Lock Co. LLC*, 2014 WL 6766265, at *1 (C.D. Cal. Sep. 17, 2014). Courts primarily consider the plaintiff's choice of forum, access to evidence, judicial efficiency, convenience to party witnesses and, especially, convenience to third-party witnesses. *See Jones*, 211 F.3d at 498-99; *Regents of the Univ. of Cal. v. Eli Lilly & Co.*, 119 F.3d 1559, 1565 (Fed. Cir. 1997).

Furthermore, a heavy burden falls squarely on United, as the moving party, "under section 1404(a) to establish why there should be a change of forum" and "it is not enough that [United] would prefer another forum, nor is it enough merely to show that the claim arose elsewhere." *FERC v. Barclays Bank PLC*, 105 F. Supp. 3d 1121, 1136 (E.D. Cal. 2015) (*quoting Allstar Marketing Group, LLC v. Your Store Online, LLC*, 666 F. Supp. 2d 1109, 1131 (C.D. Cal. 2009)). This burden is heavy because substantial weight must be accorded to the United States' decision to file its Complaint in this District. *See Amini Innovation Corp. v. JS Imps., Inc.*, 497 F. Supp. 2d 1093, 1109 (C.D.

Cal. 2007); *see also Catch Curve, Inc. v. Venali, Inc.*, 2006 WL 4568799, at *1 (C.D. Cal. Feb. 27, 2006) ("Substantial weight is accorded to the plaintiff's choice of forum, and a court should not order a transfer unless the 'convenience' and 'justice' . . . factors weigh heavily in favor of venue elsewhere."); *Cochran v. NYP Holdings, Inc.*, 58 F. Supp. 2d 1113, 1119-20 (C.D. Cal 1998) ("[P]laintiff's choice of forum is ordinarily given great deference" and to overcome "the strong presumption in favor of plaintiff's choice of forum," defendants must "clearly demonstrate[e]" the balance of inconvenience weighs in their favor) (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981)); *see also* 17-111 Moore's Federal Practice § 111.13 (2017) ("As a general rule, the plaintiff's choice of forum is given significant weight and will not be disturbed unless the other factors . . . weigh substantially in favor of transfer.").

Because of the heavy burden in overcoming the deference to be accorded the United States' decision to file its Complaint here, United must show that it would be significantly more convenient for witnesses if this action were transferred to the District of Columbia. A mere showing of roughly equal inconvenience is insufficient to warrant transfer. *Gherebi v. Bush*, 352 F.3d 1278, 1303 (9th Cir. 2003) ("Section 1404(a) provides for transfer to a more convenient forum, 'not a forum likely to prove equally convenient or inconvenient[.]'") (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 646 (1964)), *vacated on other grounds sub nom. Bush v. Gherebi*, 542 U.S. 952 (2004); *In re Nat'l Presto Indus.*, 347 F.3d 662, 665 (7th Cir. 2003) ("When plaintiff and defendant are in different states there is no choice of forum that will avoid imposing inconvenience; and when the inconvenience of the alternative venues is comparable there is no basis for a change of venue; the tie is awarded to the plaintiff[.]"); *Atlantique Prods., S.A. v. Ion Media Networks Inc.*, 2013 WL 12133636, at *3 (C.D. Cal. Feb. 28, 2013) ("Defendant cannot show that New York is a more convenient forum. As the witnesses and documents in this case are spread across four locations, thousands of miles apart, Defendant at best demonstrates that New York is equally as inconvenient as Los Angeles."). In this case, as shown below, United fails to meet this heavy burden.

B. United Has Failed To Meet Its Heavy Burden Of Showing That The District Of Columbia Is A Significantly More Convenient Forum

1. The Connection Between This Case And This District Is Substantial

This District is the factual center of much of the conduct at issue in this case. As described in the Complaint, the genesis of United's Chart Review and other risk adjustment programs occurred in this District, when, in 2005, United acquired PacifiCare and its Risk Adjustment group, both of which were located in this District. Compl. ¶¶ 33-34, 81-83, 95, 122-123. This group performed the risk adjustment work and conducted risk adjustment programs (*e.g.*, chart review programs) for PacifiCare's Medicare Advantage Plans, which were located in California and other Western States. *Id*. PacifiCare employees in this group included, among others, Stephanie Will, Pam Leal, Pam Holt, Rebecca Martin, and Randy Myers. *Id*. ¶¶ 81-82; Wallack Decl. ¶ 7. After the acquisition, these PacifiCare employees designed, implemented, and managed United's risk adjustment programs and risk adjustment data submission and deletion systems and processes. In particular, Will, who pioneered PacifiCare's Chart Review Program prior to the acquisition, developed and implemented United's national Chart Review Program, which is at the factual center of this case. Compl. ¶ 123; Wallack Decl. ¶ 10. Will, Leal, and Holt also developed and ran the IDV Program to address over-coding by providers, especially those in California. In 2010, when the IDV Program became the RACCR Program, Patty Brennan, who worked in this District, ran it. Wallack Decl. ¶ 12. The RACCR Program is also at the heart of this case.

Following the acquisition, the Risk Adjustment group in this District continued to operate using the name PacifiCare. In 2007, the former PacifiCare employees became employees of a United company called Ingenix, but they continued to work in this District. Compl. ¶ 95; Wallack Decl. ¶ 8. Also, starting in or about 2008, Ingenix hired additional employees, such as Jon Bird and Patty Brennan, in order to expand the work performed by the Ingenix Risk Adjustment group in this District. Compl. ¶ 95. This additional work included the RACCR and Claims Verification Programs. Wallack Decl.

¶ 9. Several years after 2007, Ingenix's name was changed to Optum and the Risk Adjustment group continued to operate in this District. The PacifiCare/Ingenix/Optum Risk Adjustment group in this District was responsible for numerous activities at the heart of this action. The Complaint and the Wallack Declaration describe some of those activities, which include, but are not limited to, the design, implementation, management and operation of United's Chart Review, Claims Verification, IDV, and RACCR Programs. *See* Wallack Decl. ¶¶ 9-14.

The evidence also demonstrates that events, occurrences, and various activities that occurred in or near to this District gave rise to United's knowledge about both the requirements for submitting valid risk adjustment data, the problems with the validity of diagnosis codes reported by providers, and the obligation to delete, withdraw, or otherwise correct invalid codes that were submitted to the Medicare Program for payment. This knowledge stems in part from the involvement of United employees in the Industry Collaborative Effort ("ICE") and ICE's Risk Adjustment Data Acquisition & Reporting ("RADAR") team. As explained in the United States' Complaint, ICE was an association of MAOs and provider groups in California that served beneficiaries in these organizations' Medicare Advantage plans. Compl. ¶¶ 84, 87; *see also id*. ¶¶ 91-92 (referring to a discussion that CMS, the government agency that runs the Medicare Program, had with members of ICE's RADAR team in which CMS explained that it expected MAOs to correct invalid diagnoses submitted to Medicare for risk adjustment payments and to implement oversight processes to ensure the validity of diagnosis codes reported by providers to the MAOs); ¶ 108 (referring to a document in which Holt stated that risk adjustment data validation was "a subject discussed frequently at the ICE meetings"). This knowledge also stems in part from the experiences of the former PacifiCare employees from their time working for PacifiCare and its California MA Plan. *See* Compl. ¶¶ 88-90. In addition, the IDV audits conducted by the Ingenix office in Santa Ana focused in large part on California providers and confirmed the on-going problem with the validity of diagnoses reported by providers in California. *Id*. ¶¶ 110,

200. So too did the subsequent RACCR audits conducted first by Ingenix and then Optum in this District. *Id*. ¶¶ 200, 206; Wallack Decl. ¶¶ 16-17. In 2010, a government audit also highlighted the serious problem with the validity of diagnoses submitted by providers for beneficiaries enrolled in United's California MA Plan. Compl. ¶ 112. All of this activity occurred in or concerned this District.

Furthermore, over the last decade, numerous Medicare beneficiaries enrolled in United's California MA Plan were served by financially-incentivized providers, and many of the financially-incentivized provider groups included in United's IDV and RACCR Programs were and still are located in California. *See* Exhibit 3 to Complaint; Marsh Decl. ¶ 4. These provider groups had a strong financial incentive to over-code, *i.e*., submit invalid diagnosis codes, because they shared a portion of the risk adjustment payments that United received from the Medicare Program. Compl. ¶ 198. United created these financial incentives and knew that they encouraged increases in coding intensity. Furthermore, as United learned from its IDV and RACCR audits, many of these California provider groups engaged in significant over-coding. *Id*. ¶ 200. Fifteen of these groups failed RACCR sample reviews and, yet, United never reviewed 100 percent of the problematic diagnosis codes at issue in order to delete or withdraw all invalid diagnoses reported by these providers. *Id*. ¶ 215 and Exhibit 4. Three of the extreme outlier provider groups specifically discussed in the Complaint are located in California, including Edinger Medical Group, HCP, and Hemet Community Medical Group. Compl. ¶¶ 219, 220, 222. The United States intends to subpoena documents from numerous RACCR provider groups located in California. These documents will include medical records relating to United's California MA Plan beneficiaries who were served by these providers and are located in or near this District. Thus, because this District is the factual center of this case, it is more convenient for the parties.

2. The Convenience Of Witnesses Significantly Favors This District

"In assessing the effect of a transfer on the convenience of witnesses, courts consider the effect of a transfer on the availability of certain witnesses, and their live

testimony at trial." *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 89 F.R.D. 497, 501 (C.D. Cal. 1981) (internal citations omitted); *see also Credit Acceptance Corp. v. Drivetime Auto. Grp., Inc.*, 2013 WL 12124382, at *4 (C.D. Cal. Aug. 5, 2013) (citing convenience of witnesses, especially non-party witnesses, as leading factor); *Steelcase Inc. v. Haworth, Inc.*, 1996 WL 806026, at*2 (C.D. Cal. May 15, 1996) ("The convenience of the witnesses is often the most important factor considered by the court when deciding a motion to transfer for convenience."). As this Court has repeatedly noted, "[c]onvenience is not determined merely by tallying the names offered by each side – the Court considers not only the quantity of the witnesses, but also the substantive contributions of their anticipated testimony." *Saylor v. Saylor Publ'ns, Inc.*, 2012 WL 12893759, at *2 (C.D. Cal. Dec. 4, 2014); *Stock v. Xerox Corp.*, 2016 WL 5867436, at *3 (C.D. Cal. Apr. 13, 2016) (examining the locations of "key witnesses . . . with first-hand knowledge").

In this FCA action, the availability of witnesses is not an issue because of the nationwide subpoena power of courts in FCA cases,[6] so the focus is solely on convenience. Accordingly, the crucial question, in this FCA case, is whether United has met its burden of showing that it is substantially more convenient for witnesses, especially non-party witnesses, to attend a potential trial in the District of Columbia rather than this District. The answer is no for at least three reasons.

First, because of the substantial contacts of this case with this District, there are numerous third-party, as well as party, witnesses in this District. At this time, the United States knows of at least eight key witnesses residing in or near California whom it presently anticipates calling as witnesses to testify at a trial. *See* Wallack Decl. ¶ 14. These key witnesses include three third-party witnesses (Melissa Ferron, Pam Holt, and

[6] Under section 3731(a) of the FCA, a court can issue a subpoena to anyone in the United States whose testimony is required at a trial in the district in which the FCA action is pending. Thus, the concern is not about the availability of witnesses. In addition, the location of depositions is not at issue. Witnesses will be deposed where they live, work or otherwise agree to attend their depositions.

Pam Leal) and five current Optum employees (John Bird, Patty Brennan, Rebecca Martin, Randy Myers, and Stephanie Will). *Id*. Their relevancy to this matter is described in detail in the *Poehling* Complaint and the Declaration of Carol Wallack. *Id*. ¶¶ 10-14. For example, Pam Holt and Pam Leal were responsible for training healthcare providers about Medicare's medical record documentation and accurate coding requirements; were active members of ICE and RADAR; and are knowledgeable about United's IDV audits. *See* Wallack Decl. ¶ 14. Melissa Ferron was United's diagnosis coding expert for its risk adjustment programs, including its Claims Verification and RACCR Programs. *Id*. ¶ 14. And, Stephanie Will, John Bird, and Patty Brennan had significant responsibilities for the Chart Review, Claims Verification, IDV and RACCR Programs. *Id*. ¶¶ 10-12.

Moreover, there are many more witnesses who reside in or near California and have knowledge relevant to this action. *See* Wallack Decl. ¶¶ 15, 17. More than half of these witnesses are third-parties. *Id*. It is very likely that the United States would call at least some, if not many, of these witnesses to testify at trial. The relevancy of the testimony of these witnesses is described in detail in the Declaration of Carol Wallack. *Id*. Six of these witnesses are also referenced in the United States' Complaint. *See* Compl. ¶ 136 (Ronnie Grower); ¶ 171 (Donald James); ¶ 155 (Cynthia Polich); ¶ 137 (Janice Redmond); ¶ 120 (Carol Thompson); and ¶ 103 (Karen Wagor). These witnesses include former and current employees of United and members of ICE and its RADAR team. *See* Wallack Decl. ¶ 15. Many of the third-party witnesses include employees of the financially-incentivized California provider groups that were audited as part of United's RACCR Program. *Id*. ¶ 17. They are knowledgeable about these audits, including the results of the sample reviews and why 100 percent reviews were not conducted when the providers failed the sample audits and, thus, why all invalid diagnoses were not identified and deleted.

Second, both former and current government employees will *not* be inconvenienced by traveling to this District to testify in the event of a trial. United only

identifies by name three former government employees whom it intends to call to testify at trial: Marilyn Tavenner, Jonathan Blum, and Sean Cavanaugh. Def. Br. at 14. United contends that these individuals agreed that United could violate the FCA by disregarding the results of its chart reviews showing that hundreds of thousands of diagnoses were invalid. Nothing could be further from the truth and United breached the attorney-client relationship between DOJ and its client agency when, without informing DOJ, it engaged in discussions with these then-current government employees about an issue that United knew was at the heart of DOJ's fraud investigation.[7] In any event, government counsel has spoken with Tavenner, Cavanaugh, and Blum about United's assertion that this action should be transferred to accommodate them. All three individuals, now former government employees, have stated and given counsel for the United States permission to represent to this Court that they would *not* be inconvenienced by traveling to this District to testify at trial and that doing so would be fine with them. Wallack Decl. ¶ 2.

United identifies by name one current government employee whom it intends to call to testify at a trial, Cheri Rice. Def. Br. at 15. Rice is the government employee who told United that CMS could not provide advice about the laws that impose standards, requirements, and responsibilities on United with respect to the payments United received from the Medicare Program. Compl. ¶ 187. Rice and any other current government employees with relevant knowledge would *not* be inconvenienced by traveling to this District for a trial. As previously stated, such travel is part of the work they perform and the United States recognizes that it has consented to its employees

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[7] As alleged in the United States' Complaint, United asked these individuals about the retroactivity of a proposed regulation. Compl. ¶¶ 179-88. This proposed rule was not finalized. However, the Ninth Circuit, in *Swoben*, concluded that this fact was inconsequential because, at the time the government decided not to finalize the rule, "it reiterated that it has 'always expected that [a Medicare Advantage] organization … implement, during the routine course of business, appropriate payment evaluation procedures in order to meet the requirement of certifying the data they submit to CMS for purposes of payment'." 848 F.3d at 1169-70 (*quoting* 79 Fed. Reg. 29,844, 29,923 (May 23, 2014)).

appearing in this District to testify. It is, however, extremely doubtful that United will call "at least two dozen" government employees to testify at trial. Def. Br. at 15.[8] If and when United deposes any such government employees, it will more fully understand that their testimony does not support, but rather undermines, United's defenses.

Third, United does not come close to establishing that it would be substantially more convenient for witnesses in Minnesota to travel to the District of Columbia than to this District. The United States disputes that (1) the difference in flying time is as great as asserted by United given the fact that distance differs by about 500 miles, and (2) the small difference in the purported flying time by commercial air is a legitimate issue for these witnesses. But the greater problem with United's argument is that it fails to consider the substantial inconvenience transfer would impose on the many third-party and party witnesses in or near California who have significant knowledge about the issues at the heart of this case and legitimately can be expected to testify at trial. Thus, United fails to meet its heavy burden of showing that the District of Columbia is a significantly more convenient venue for a trial than this District.

3. Access To Other Sources Of Proof Does *Not* Weigh In Favor Of Transfer

The physical evidence in this case will consist almost entirely of documents and data that were created, transmitted, and stored electronically, or which will, during discovery, be scanned and produced electronically. Courts have sensibly come to recognize that the location of documents or electronic servers is not relevant in such cases. *See, e.g, Byler v. Deluxe Corp.*, 222 F. Supp. 3d 885 (S.D. Cal. 2016) ("Defendant acknowledges that this [location of evidence] factor is neutral, despite the fact that many of Defendants records are located outside of California."); *Lax v. Toyota Motor Corp.*, 65 F. Supp. 3d 772, 780 (N.D. Cal. 2014) ("[W]here electronic discovery

[8] Although United speculates that these government employees will provide testimony supporting its defenses, it admits that it does not even know who they are much less what they will say. Def. Br. at 16-17. Accordingly, United does not know that it will call (or even that it is likely that it will call) any of these government employees to testify at trial and the Court should discount United's speculative and unsupported statement that it anticipates doing so.

is the norm (both for electronic information and digitized paper documents), ease of access is neutral given the portability of the information) (citing *Finjan, Inc. v. Sophos Inc.*, 2014 WL 2854490, at **5-6 (N.D. Cal. June 20, 2014); *see also Fanning v. CAPCO Contractors, Inc.*, 711 F. Supp. 2d 65, 70 (D.D.C. 2010); *Metz v. U.S. Life Ins. Co. in City of New York*, 674 F. Supp. 2d 1141, 1148 (C.D. Cal. 2009).

However, to the extent considerations about the physical location of documents is relevant, this factor favors California because this is where many of the financially-incentivized RACCR providers and their documents, including medical records, are located. If these providers fail or refuse to comply with the United States' subpoenas, it would be best for the Court in which this action is pending to address that issue and it would be inconvenient for these California providers to have to do this in the District of Columbia, thousands of miles from where they are located. Notably, United has not identified any third-parties with relevant documents located in the District of Columbia. Thus, access to other sources of proof favors this District.

C. There Is No Merit To United's Argument That The United States' Decision To File This Action In This District Should Not Be Accorded Substantial Weight

As previously stated, *see supra* Section III.A., courts accord the plaintiff's choice of forum substantial weight. In the Ninth Circuit and in this District in particular, courts emphasize the presumption in favor of the plaintiff's choice of forum, which choice is accorded "substantial weight." *See, e.g.*, *FERC*, 105 F. Supp. 3d at 1138 ("substantial weight"); *Catch Curve, Inc. v. Venali, Inc.*, 2006 WL 4568799, at *1 (same); *see also Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986) ("defendant must make a strong showing of inconvenience to warrant upsetting the plaintiff's choice of forum").

United, however, argues that the United States' decision to file its action in this District is irrelevant and should be accorded no weight. Instead, it focuses on the Relator's choice of forum. This is not correct. The United States is the principal

plaintiff and, more importantly, the real party in interest in all FCA actions, including when a case is under seal and pre-intervention. *See United States ex rel. Zissler v. Regents of the Univ. of Minn.*, 154 F.3d 870, 872 (9th Cir. 1998). The United States also has the primary responsibility for prosecuting the action. 31 U.S.C. § 3730(c)(1). The United States is not bound by a relator's decision to file a *qui tam* complaint in any particular district. *Id*. If the United States decides to proceed with an FCA action and concludes that it is appropriate to file its complaint in another district, it can either file its complaint in the other district or, more preferably, move to transfer the *qui tam* complaint to the other district. Here, the United States did the latter, which is an accepted practice in sealed FCA cases. And, because the defendant named by a relator in a sealed, unserved *qui tam* complaint is not yet a party, it is not consulted by the court or the United States.

Rather than address the United States' choice of forum, United merely accuses it of "mischief," as if Judge Arcara was ignorant of the fact that Relator Poehling's sealed *qui tam* complaint named fifteen different entities as defendants. Had Judge Arcara believed that either the court or the United States was obliged to consult these fifteen entities, he would and could have done so or required the United States to do so. But he did not, because neither the court nor the United States was obliged to do so. United and the other entities were not parties to this action at that time. And, until it was served with the Complaint, United was not a party in this action. *See, e.g., Travelers Cas. & Sur. Co. of Am. v. Brenneke*, 551 F.3d 1132, 1135 (9th Cir.2009) ("A federal court is without personal jurisdiction over a defendant unless the defendant has been served in accordance with Fed. R. Civ. P. 4") (internal quotation marks omitted).

In transferring this case, Judge Arcara ruled appropriately and this Court should reject United's suggestion that it find fault with Judge Arcara's consideration of the United States' motion to transfer. There is nothing in the record to suggest that Judge Arcara should have believed that the United States' motion was *ex parte* (it was sealed, not *ex parte*) or consulted the fifteen entities named as defendants by Poehling in his

First Amended Complaint, which was then still under seal and had not been served on any defendant at that time. Even if Judge Arcara had done so, any outcome is speculative. United and the other entities named in Poehling's Complaint may have had varying positions about a convenient venue for this case, as they each had their own separate interests and, other than United, none of them are parties to the APA action in the District of Columbia. It is speculative that there would have been any consensus among all these entities and presumptuous to think that Judge Arcara would have transferred the action to the District of Columbia, especially in light of the related *Swoben* action in this District and the presence of numerous witnesses in California.

Further, ignoring the substantial weight that must be accorded to the United States' decision to file its Complaint in this District would be troublesome, given that Congress created a broad venue provision to enforce the FCA, the government's primary tool to address fraud against it. This provision allows the United States to file an FCA action "in any judicial district in which the defendant . . . can be found, resides, transacts business, or in which any act proscribed by [the FCA] occurred." 31 U.S.C. § 3731(a). The deference that must be shown to the decision to bring an action in a particular district is particularly important in light of this expansive venue provision.

Most importantly, there was no mischief here. The transfer of this action to this District was reasonable and consistent with efficient litigation and considerations of judicial economy in light of the related, earlier-filed *Swoben* case *against United in this District* and the benefits of consolidation or coordination of both cases.[9] United's venue

[9] *See e.g. Evans v. Arizona Cardinals Football Club, LLC,* 2016 WL 759208, at *3 (D. Md. Feb. 25, 2016) ("transferee judge's 'experience with the parties and his knowledge of the facts and law...weighs very strongly in favor of transferring' and would 'promote judicial economy and avoid the possibility of inconsisten[cy]'") (citing *D2L Ltd. v. Blackboard, Inc.*, 671 F. Supp. 2d 768, 784 (D. Md. 2009) (interests of justice weighs "strongly in favor of transfer when a party has previously litigated a case involving similar issues and facts before the transferee court")); *U.S. Ship Mgmt., Inc. v. Maersk Line, Ltd.*, 357 F. Supp. 2d 924, 938 (E.D. Va. 2005) ("where a party has previously litigated a case involving similar issues and facts [such that] 'a court in that district will likely be familiar with the facts of the case, [a]s a matter of judicial economy, such familiarity is highly desirable'") (citation omitted).

motion does not present remotely sufficient grounds to undo the sensible and appropriate selection made by the United States as plaintiff and real party in interest, a selection that was wholly in accordance with the FCA's broad venue provision and, in the context of the present motion, is to be accorded substantial weight under the applicable authorities. Accordingly, the United States' decision to file its Complaint in this District should be given deference.

D. United's Argument That This FCA Action Should Be Transferred In Order To Be Coordinated With Its APA Action Should Be Summarily Rejected

United's motion hinges on the false hope that this FCA action (but, oddly, *not* the closely related *Swoben* FCA action also in this District) should be "heard together" with the APA action in the District of Columbia. Def. Br. at 11. There are two principal problems with United's coordination argument.

First, Judge Collyer has already concluded that resolution of this FCA action and the APA action do *not* hinge on the same legal issues. Judge Collyer reasoned that the fraudulent conduct alleged in this case predates the rule at issue in the APA case and that the rule is not at issue in this case. 2017 WL 2623783, at *2. Judge Collyer further reasoned as follows:

> This APA case is limited to whether CMS acted beyond its authority when promulgating its 2014 Overpayment Rule. It does not concern the actions of United in any way, and any analysis by the Court would be limited to the administrative record behind the 2014 Overpayment Rule and the statute. Any factual record developed in the FCA Cases would have very limited relevance, if any, to [the] APA review of the 2014 Overpayment Rule.

Id.

Judge Collyer also stated that the FCA actions could be resolved without consideration of any issues potentially in common with the APA action, and that whether United engaged in fraud is a different issue as to whether a government agency appropriately promulgated a regulation. *Id*. at *3. As noted, she expressly concluded

that "[t]he two FCA Cases will require considerable discovery and take much longer to bring to conclusion," while "the 2014 Overpayment Rule [which is the focus of the APA case] will rise or fall on the administrative record that preceded it" and "the relevant facts and legal standards will be entirely different." *Id*.

Moreover, the Ninth Circuit, in its decision in *Swoben*, also took pains to clarify that United's FCA liability does not depend on the Overpayment Rule. It noted that:

> this is not a case about whether [MA] organizations have to *take* affirmative steps to verify risk adjustment data [the issue in the APA case]. The defendants indisputably took such steps by conducting retrospective reviews. This is a case about whether such organizations, having adopted affirmative verification procedures, have to conduct them in good faith.

848 F.3d at 1179 (emphasis in the original). This is equally as true in this case as it is in *Swoben*. As previously explained, both this case and *Swoben* are fraud cases which focus on United's deliberate or reckless disregard of the negative results of its blind chart reviews and, thus, its improper avoidance of its obligation to delete or withdraw invalid diagnoses that it previously submitted to the Medicare Program for payment. The decision by the APA court on the Overpayment Rule, based exclusively on the administrative record, will not even examine United's conduct at issue in this FCA action, *i.e.*, its deliberate or reckless failure to "look both ways."[10]

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[10] The Ninth Circuit articulated the key issue in the *Swoben* action (and, thus, this action) as follows when discussing the claim that United's Risk Adjustment Attestations (also referred to as "certifications") were false because of its failure to delete or otherwise withdraw the invalid diagnoses:

> If Medicare Advantage organizations acquire the codes identified by retrospective coders, compare them to the codes previously submitted to CMS, identifying both under- and over-reporting errors, but withhold information about the over-reporting errors from CMS, this would result in a false certification. The same is true when a Medicare Advantage organization undertakes comprehensive blind coding but then runs a unidirectional comparison with the previously submitted codes to review only under-reporting errors. . . . In the second example, where the organization turns a blind eye to the over-reporting errors, it exhibits reckless disregard and deliberate ignorance toward the truth or falsity of the data submitted to CMS.

848 F.3d at 1175-76.

Second, United has failed to demonstrate how an FCA case could possibly be coordinated with an APA case, as they are two different species. As Judge Collyer explained, the FCA cases "will require considerable discovery and take much longer to bring to conclusion," while, "[i]n stark contrast," the APA case "will rise or fall on the administrative record that preceded it." 2017 WL 2623783, at *3. Indeed, the APA case will be decided on cross-motions for summary judgment, which will be fully briefed in the next few months. There will be no discovery and no trial in that case. There are simply no events or activities, *e.g.*, depositions or document productions, which require coordination. The APA case can and likely will be resolved much sooner than this action. Given that Judge Collyer did not identify any potential for coordination between the APA and this action, no weight should be given to United's argument on this point.

In addition, assuming *arguendo* that there was something to coordinate between this FCA action and APA case (which there is not) and that coordination might achieve some convenience (which it will not), United is also incorrect in asserting that, venue for the APA case cannot lie in this District and that the APA case cannot be transferred to this District. Def. Br. at 11. The venue statute does not stand as an impassable bar if United's true goal were efficient and appropriate coordination of these matters. In a federal case, "personal jurisdiction and venue are waivable defects, they are unlike a failure to exhaust in that they merely concern a choice among courts; they do not concern a prerequisite to bringing suit in any court." *Albino v. Baca*, 747 F.3d 1162, 1170 (9th Cir. 2014). Although there is no benefit to coordination between the APA and FCA cases, if coordination is truly United's goal, the United States will not object to transfer of the APA case to this district, which is permissible under the federal venue statute, 28 U.S.C. § 1391, and is where the first case, *Swoben*, was filed.[11]

[11] Also, transfer and coordination of cases is also not a prerequisite for a court, in an FCA case, to consider a decision in an APA case if it is relevant. If, at some point, United believes that the decision in the APA case has some bearing on this FCA case, it can simply cite the decision to this Court. This is, presumably, how United has elected to proceed in *Swoben*, which United is not seeking to transfer.

United, however, has not elected to transfer the APA case here for obvious reasons. The Ninth Circuit, *in Swoben*, has already rejected United's argument that it does not have any obligation to undertake affirmative steps to ensure the validity of the diagnoses that it submits for payments. 848 F.3d at 1174, 1178 (stating that United's argument was "unpersuasive" and stating, "[w]e again disagree"). And, the Ninth Circuit has also already rejected United's meritless "apples-to-apples" argument regarding its data verification claim:

> According to the defendants, because CMS does not verify diagnosis codes submitted to it by third-party medical providers under the Medicare fee-for-service program, this provision means Medicare Advantage organizations were not required to verify diagnosis codes either. We reject defendants' contention . . . for multiple reasons.

Id. at 1179.[12] Because of the Ninth Circuit's opinion in *Swoben*, United seeks to transfer this case to the District of Columbia despite the fact that there is nothing to coordinate between this case and the APA case and regardless of what is convenient for witnesses or in the interest of justice.

IV. CONCLUSION

For the foregoing reasons, the United States and Relator Benjamin Poehling respectfully request that the Court deny United's motion to transfer.

[12] United's argument is also incorrect (dooming its APA action) because neither the Medicare statute nor any CMS regulation exempts United from its obligations to submit valid data for Medicare payments and its regulatory obligations to implement effective compliance programs to ensure the validity of its data. *See Swoben*, 848 F.3d at 1179 ("because nothing in [42 C.F.R.] § 422.310(d) speaks to a Medicare Advantage organization's obligations to ensure the accuracy of risk adjustment data, it does not modify a Medicare Advantage organization's obligations under §§ 422.503(b)(4)(vi) [the compliance regulation] and 422.504(l) [the Risk Adjustment Attestation Regulation]"). The Medicare statute also does not entitle United to receive or keep risk adjustment payments based on diagnoses that are unsubstantiated by beneficiaries' medical records.

Respectfully submitted,

Dated: August 28, 2017

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Attestation

I hereby attest that the other signatory listed, on whose behalf the filing is submitted, concurs in the filing's content and has authorized the filing.

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

UNITED STATES OF AMERICA *ex rel*. BENJAMIN POEHLING,

Plaintiffs,

v.

UNITEDHEALTH GROUP, *et. al.*,

Defendants.

No. CV 16-08697 MWF (SSx)

DECLARATION OF CAROL WALLACK IN SUPPORT OF THE UNITED STATES' AND RELATOR BENJAMIN POEHLING'S CONSOLIDATED OPPOSITION TO UNITED'S MOTION TO TRANSFER

Hon. Michael W. Fitzgerald
Courtroom: 5A

Hearing Date: September 25, 2017
Hearing Time: 10:00 a.m.

I, Carol Wallack, declare and state as follows:

1. I am a trial attorney at the Fraud Section in the Civil Division of the United States Department of Justice ("DOJ"). I represent the United States in the above-captioned action. I am also one of the DOJ attorneys who investigated the allegations made by Relator Benjamin Poehling in his complaint in this *qui tam* action in which the United States has now intervened. I submit this declaration to provide background information relevant to the United States' and Relator Benjamin Poehling's Consolidated Opposition to United's Motion to Transfer and to address information provided in the Declarations of Daniel Meron and Karen Erickson in support of United's Motion to Transfer. The information provided in this declaration is based on my personal knowledge or is information provided by the United defendants to DOJ during the investigation, information set forth in documents produced by the these defendants and others during the investigation, and testimony provided by these defendants' current and former employees and other witnesses during the investigation.

2. Mr. Meron's declaration states that there are three "key non-party witnesses" who live in or near the District of Columbia: Marilyn Tavenner, Jonathan Blum, and Sean Cavanaugh. Declaration of Daniel Meron at ¶ 2. These witnesses are former employees of the Centers for Medicare & Medicaid Services ("CMS"), the federal government agency that manages the Medicare Program. Other attorneys working on this action and I have personally spoken with each of these individuals about United's suggestion to this Court that it would be inconvenient for them to travel to Los Angeles for a possible trial in this action someday. All three individuals told my colleagues and me that it would *not* be inconvenient for them to do so and that traveling to Los Angeles to testify would be fine with them. Pursuant to 28 C.F.R. § 50.15, DOJ also represents Ms. Tavenner and Mr. Cavanaugh for purposes of their involvement in this action.

3. Mr. Meron's declaration identifies four United employees who provided testimony in the investigation and reside in California. Declaration of Daniel Meron at ¶

4. Other United employees provided testimony in the investigation and reside near California. These employees include: Stephanie Will, who testified that she resides in Phoenix, Arizona; and Randy Myers, who also testified that he teleworks for United from his home in Arizona. In addition, United's coding and chart review contractor, Melissa Ferron, provided testimony in the investigation. Ms. Ferron testified that she resides in the Greater Los Angeles area. Accordingly, seven of the United witnesses who testified in the investigation reside in or near California, including Sanjeev Balsara, Jon Bird, Patty Brennan, Melissa Ferron, Rebecca Martin, Randy Myers, and Stephanie Will.

4. Mr. Meron's declaration states that forty individuals were expressly identified by name in the United States' Complaint-In-Partial-Intervention ("Complaint") in this action. He further states that twelve of these individuals reside in or near California and two reside roughly equidistant between Los Angeles and Washington D.C. Declaration of Daniel Meron at ¶ 7. Ms. Erickson's declaration states that nine individuals expressly identified in the Complaint reside in California, eight of these nine individuals are either current or former Optum employees and one (Melissa Ferron) is defendant Optum's coding vendor. Declaration of Karen Erickson at ¶ 5. However, the United States' Complaint does not expressly identify any witness who resides in Washington D.C. The United States' Complaint expressly identifies only one government employee, Cheri Rice, the current Director of the Medicare Plan Payment Group at CMS. Ms. Rice works at the CMS Headquarters in Baltimore, Maryland.

5. Ms. Erickson's declaration states that Optum's operations in Santa Ana, California, were "back-end" and involved "processing." Declaration of Karen Erickson at ¶ 8. It further states that approval of deletes and decisions regarding the scope and design of the Chart Review, Claims Verification ("CV"), and Risk Adjustment Coding and Compliance Reviews ("RACCR") programs occurred in Minnesota. *Id*. at ¶¶ 9-10. However, Ms. Erickson acknowledges that Optum, either "directly or through various direct and indirect corporate subsidiaries of its own, provides data, analytics and other

support services to a wide array of healthcare companies, including private insurers" and further "provides these services to UHC as well as to insurance companies not affiliated with UHC." *Id*. at ¶ 4. Additionally, information provided by United as part of the investigation and other evidence obtained during the investigation, including documents produced by United and testimony from United's current and former employees, demonstrate that employees who worked for or at defendant Optum's and its predecessors' offices in this District were responsible for numerous activities at the heart of this action, including the following:

a. Training healthcare providers and their staffs about the CMS requirements for submitting valid diagnosis codes for risk adjustment payments, including the requirements that the Medicare beneficiaries' medical conditions are documented in their medical records and that the conditions are accurately coded;
b. Designing, implementing, managing and operating the Chart Review, CV, Internal Data Validation ("IDV"), and RACCR Programs;
c. Submitting diagnosis codes to the Medicare Program for risk adjustment payments, including submitting codes identified by United's coders as part of United's Chart Review Program;
d. Deleting or withdrawing diagnosis codes previously submitted to the Medicare Program but then determined to be invalid as a result of the CV, IDV, and RACCR Programs;
e. Analyzing data from the Chart Review Program to determine the additional risk adjustment payments generated by the program and to assess whether United was achieving its revenue targets for the program;
f. Analyzing data from the CV Program to determine the negative monetary impact of deleting or withdrawing diagnoses based on that program; and

g. Estimating liability reserves and accruals based on the projections of deletes from the CV Program so that those reserves could be recorded in UnitedHealth Group's consolidated financial statements.

6. Furthermore, the evidence demonstrates that events, occurrences, and various activities that occurred in or near this District gave rise to defendants' knowledge about the requirements for submitting valid risk adjustment data, the problems with the validity of diagnosis codes reported by providers, and the obligation to delete or withdraw diagnoses unsupported by beneficiaries' medical records. This knowledge stems in part from the involvement of United employees (who were previously employees of PacifiCare Health Systems ("PacifiCare")) in the Industry Collaborative Effort ("ICE") and ICE's Risk Adjustment Data Acquisition & Reporting ("RADAR") team. As explained in the United States' Complaint, ICE was an association of Medicare Advantage ("MA") Organizations and their California MA Plans as well as provider groups in California that served beneficiaries in these plans. *See* United States' Complaint ("Compl.") at ¶¶ 85, 87. *See also id.* at ¶¶ 91-92 (referring to a discussions that CMS had with members of ICE's RADAR team in which CMS explained that it expected MA Organizations to correct invalid diagnoses submitted to Medicare for risk adjustment payments and to implement oversight processes to ensure the validity of diagnosis codes reported by providers to the MA Organizations); ¶ 108 (referring to a document in which Pam Holt, a United employee, stated that risk adjustment data validation was "a subject discussed frequently at the ICE meetings"). This knowledge also stems in part from the experiences of these individuals when they worked for PacifiCare and its California MA Plan, PacifiCare of California. *See* Compl. at ¶¶ 88-90. Moreover, the IDV audits conducted by the office of Optum's predecessor, Ingenix (located in this District), focused in large part on California providers and confirmed the on-going problem with the validity of diagnoses reported by providers in California. *Id.* at ¶ 110. So did the RACCR audits of California providers, *id*. at ¶ 215, and the Government audit of United's California MA Plan. *Id*. at 112.

7. In 2005, United acquired PacifiCare and its Medicare Advantage ("MA") Plans. Compl. ¶ 33. PacifiCare's corporate office was in Cypress, California. *Id*. at ¶ 34. Sometime after the acquisition, the office was moved to Santa Ana, California. *Id*. Also, individuals who worked for the PacifiCare office in California were responsible for the risk adjustment work and programs performed by PacifiCare. This included, among others, Stephanie Will, Pam Leal, Pam Holt, Rebecca Martin, Paul Bihm, Patrice Buchana, Nick Chiechi, Kevin Sommerfield, and Anita Westrup. After the acquisition in 2005, these PacifiCare employees became employees of United but continued to operate using the name PacifiCare or Secure Horizons, the brand name of the Medicare managed care products offered by PacifiCare's MA Plans.

8. In 2007, these former PacifiCare employees became employees of a United company called Ingenix but they continued to work at the same office in this District. Sometime thereafter, Ingenix became known as Optum (hereinafter Ingenix and Optum are collectively referred to as "Optum"). Some of these former PacifiCare employees are key witnesses in this action.

9. After 2007, Optum hired additional employees such as Jon Bird and Patty Brennan and increased the size of the Optum risk adjustment group in Santa Ana, California. The Optum risk adjustment group was responsible for, among other things, submission of diagnoses codes to CMS, risk adjustment data remediation and the deletion of invalid diagnoses, risk adjustment data analytics and finance (*e.g*., tracking the results and financial impact of the Chart Review and CV Programs), provider outreach and programs relating to risk adjustment, and the design, implementation, management, and operation of the Chart Review, CV, IDV, and RACCR Programs.

10. Stephanie Will is a key witness who worked for PacifiCare before the acquisition in 2005. She was responsible for designing and managing programs relating to risk adjustment. In particular, Ms. Will designed and pioneered the Chart Review Program for PacifiCare. In 2005, Ms. Will moved from Arizona to California to work at the PacifiCare office in this District. After United acquired PacifiCare in 2005, Ms. Will

was responsible for designing and pioneering United's Chart Review Program. She also managed United's Chart Review Program. Compl. at ¶ 82. In 2007, Will became the Vice President of Risk Adjustment Programs for Optum. *Id.* at ¶ 95. United has also specifically identified Ms. Will as one of the Optum employees responsible for the development and execution of the CV, IDV, and RACCR Programs. This information was provided by United's counsel to me in a chart attached to an email dated April 25, 2014. Ms. Will testified and documents relating to her show that, among other things, (i) she attended risk adjustment training programs conducted by CMS, (ii) she participated in training healthcare providers about the importance of accurate and complete documentation to support their diagnoses codes submitted for risk adjustment payments, (iii) she was aware that there were common errors relating to diagnosis codes reported by providers; (iv) she was aware of the diagnosis coding error rates shown by CMS audits and United's internal audits of beneficiaries' medical records; (v) she was involved (along with other Optum employees, including Janice Redmond who resides in California and Ronnie Grower who resides in Nevada) in efforts to identify providers who engaged in over-coding, *i.e.*, the submission of erroneous codes, and the development of the IDV program to address such over-coding, especially by providers in California; (vi) she was involved in discussions about whether United's Chart Review Program should look both ways; (vii) she was involved in the development of the CV Program; and (viii) she is knowledgeable that the results of the pilot phases of the CV Program and the results of IDV audits showed that providers were reporting significant numbers of diagnosis codes that were not supported by the beneficiaries' medical records. The United States' Complaint sets forth allegations showing why Ms. Will is a key witness in this action. *See* Compl. at ¶¶ 86, 88, 89, 91, 92, 94, 97, 98, 135, 137, 139. Defendants have also specifically identified Will as "an Optum Director, General Management" with responsibilities for the development and execution of the RACCR Program. This information was provided by United's counsel to me in a letter dated July 1, 2015. Ms. Will currently resides in Arizona. *See* Declaration of Maria Marsh at ¶ 3.

11. Jon Bird is a key witness who was hired in 2008 to work for the Optum Risk Adjustment group in Santa Ana, California. In 2010, Bird became the Director of Revenue Projections for this group. He is now a Senior Vice President. Defendants have identified Bird as a "decision maker" for the CV and RACCR Programs. This information was conveyed in a letter from United's counsel to me dated May 20, 2015. Bird was also a member of United's Risk Adjustment Advisory Board/Council, which was chaired by defendant UnitedHealth Group's Chief Executive Officer Steve Hemsley. The evidence indicates that this Board/Council was given recommendations about changes in the CV Program in late 2013, a few months before it was terminated. From 2011 to 2014, Bird was involved in determining United's financial liability accruals (or reserves) associated with deleting invalid diagnoses as a result of United's CV Program, *i.e.*, as a result of looking both ways at the results of United's chart reviews and deleting invalid codes as well as submitting additional codes to CMS. Compl. at ¶ 174. In addition, in or about 2013, Bird and his team in Santa Ana assumed significant responsibility for the Chart Review and CV Programs. In particular, Bird is knowledgeable about the results of the CV Program and the significant percentage of diagnosis codes that were invalidated as a result of the CV Program. He also oversaw the team that identified the patient charts from the Chart Review Program that were also included in the CV Program, *i.e.*, the identification of the charts for which United looked both ways at the negative and positive results of its coders' chart reviews. This team also developed the specifications that automated this chart identification process for the CV Program. In addition, Bird and others on his team were responsible for approving the deletion of invalid diagnosis codes as part of the CV Program. Since 2010, Bird has also been involved in projecting United's revenues from its Chart Review Program and regularly updating those projections to alert other United managers about shortfalls in achieving those revenue targets, which has led to efforts by United to re-review hundreds of thousands of charts to try to extract additional diagnosis codes from them. *See id. at*

¶ 133 (describing the Chart Review Program revenue targets and the Re-code Projects). Bird resides in California. *See* Declaration of Maria Marsh at ¶ 3.

12. Patty Brennan is a key witness who works for Optum in Santa Ana, California. In 2008, Brennan was hired as Optum's Compliance Manager for its risk adjustment programs. In that role, she was responsible for providing services to United relating to CMS' Risk Adjustment Data Validation audits and the IDV Program. In 2009, she became the Optum Director of Retrospective Services and, in 2013, she became the Vice President of Retrospective Services. From 2009 to 2013, she oversaw United's Chart Review Program. United has specifically identified Patty Brennan as one of the Optum employees responsible for the development and execution of the CV, IDV, and RACCR Programs. This information was provided by United's counsel to me in a chart attached to an email dated April 25, 2014. In fact, Brennan was the program manager for the CV Program for several years. She authored, sent or is knowledgeable about many important documents about the CV Program. Brennan made strategic decisions about the design of the CV Program. United also represented that "Ms. Brennan is the Optum Director of General Management and had strategic oversight of RACCR from 2009 through 2013." This information was included in a letter from United's counsel to me dated July 1, 2015. Brennan is very knowledgeable about the RACCR Program. Brennan designed the RACCR audits and oversaw their execution. Brennan lives in California. *See* Declaration of Maria Marsh at ¶ 3.

13. Rebecca Martin is a key witness who works for Optum in Santa Ana, California. United has represented that

> Ms. Martin was Director of Data Remediation from 2011 through 2015 and is now Director of Data Management Strategies. In these roles, she manages the team responsible for deleting invalid diagnoses that were submitted to the Medicare Program for risk adjustment payments and oversees the development and execution of strategies to address the delete process.

This information was conveyed by United's counsel to me in a letter dated July 1, 2015. In particular, Martin was responsible for deleting the invalid diagnoses identified as part of the CV and RACCR Programs. She is knowledgeable about how deletes are made in CMS' Risk Adjustment Processing System ("RAPS"). Martin resides in California. Declaration of Maria Marsh at ¶ 3.

14. The following eight key witnesses reside in or near California (*see* Declaration of Maria Marsh at ¶¶ 2-3) and, at this time, the United States believes it will call them to testify if there is a trial in this action:

Witness	**State of Residency**	**Relevant Knowledge**
Jon Bird – Current Optum Employee	California	*See above* at ¶ 11
Patty Brennan – Current Optum Employee	California	*See above* at ¶ 12
Melissa Ferron – Optum contractor (third-party witness)	California	She is the CEO of iCodify, a company which performed chart reviews for United as part of its Chart Review and RACCR Programs. In addition, when United could not find medical record support for diagnoses as part of the CV Program, Ferron was responsible for conducting a third review of the charts to try to save the invalid codes from being deleted. *See* Compl. ¶¶ 167, 169-170. She also provided United and its providers with advice about diagnostic coding and medical record documentation requirements. *See* Compl. ¶ 117 (relating to her knowledge about common diagnosis coding errors).
Pam Holt – Former Optum Employee (third-party witness)	California	She was a Project Manager for Network Management Operations at PacifiCare and then a Manager of United's Provider Outreach for risk adjustment programs. Compl. ¶ 82. She is knowledgeable about CMS' risk adjustment program requirements such as the obligation to delete invalid

		diagnosis codes and about risk adjustment data validation efforts in California. Compl. ¶¶ 88-92. She was an active member of ICE's RADAR team. Compl. ¶ 85. She is also very knowledgeable about United's Internal Data Validation audits starting in or about 2007 to determine the validity of diagnoses reported by provider groups, including groups in California. Compl. ¶ 101. For more information about her knowledge, *see* Compl. ¶¶ 81-85, 88-92, 94-98, 101, 108.
Pam Leal – Former Optum Employee (third-party witness)	California	She was Executive Director of Provider Training and Development for PacifiCare and then Regional VP for Market Consultation for United. Compl. ¶ 82. She was responsible for educating physicians across the U.S. about risk adjustment, including CMS' medical record documentation and accurate diagnosis coding requirements. She is also knowledgeable about United's Internal Data Validation audits of providers in California and elsewhere. In addition, Leal served as the President of ICE in the mid-2000s and was a member of the ICE Board of Directors. Compl. ¶ 85. For more information about her knowledge, *see* Compl. ¶¶ 81-85, 91, 94, 108.
Rebecca Martin – Current Optum Employee	California	*See above* at ¶ 13
Randy Myers – Current Optum Employee	Arizona	He was responsible for the submission of risk adjustment data to CMS. Myers helped develop and was the manager of United's Internal Risk Adjustment Data System ("IRADS") used by United to submit diagnoses codes to CMS and delete invalid codes. He is also knowledgeable about the requirement that capitated providers in California attest to the validity of their diagnostic data provided to United to submit to Medicare for risk adjustment payments.
Stephanie Will –	Arizona	*See above* at ¶ 10

Current Optum Employee		

15. The following is a partial list of witnesses who also reside in or near California (*see* Declaration of Maria Marsh at ¶¶ 2-3) and have knowledge relevant to this action. It is very likely that the United States will call at least some, if not many, of these witnesses to testify if there is a trial in this action:

Witness	**State of Residency**	**Areas of Relevant Knowledge**
Paul Bihm – Current Optum Employee	California	He worked for Pacificare as a VP Chief of Staff and then for Optum after the acquisition. He is knowledgeable about the development of the CV and RACCR Programs. Defendants have specifically identified him icdas having had responsibilities for the development of these programs. He also participated in a key meeting with United senior executives regarding the financial impact of deleting invalid diagnoses as a result of the CV Program. *See* Compl. at ¶ 115 (mentioning this meeting). He is currently the Senior Vice President, Optum Clinical Performance & Compliance.
Patrice Buchana – Current Optum Employee	California	She was the Director of Network Management for PacifiCare and worked for United after the acquisition. She was part of the Optum field team that interacted with healthcare providers in California on issues related to risk adjustment data and payments. She is knowledgeable about the attestation that capitated providers in California were required to sign stating that the diagnosis codes they reported to United were accurate and about notices sent by United to these providers about reporting only

		those diagnoses supported by medical record documentation.
Nick Chiechi – Current Optum Employee	California	He was a financial analyst at PacifiCare and became a Vice President of Analytics at Optum. At times during the relevant period, Chiechi was involved in tracking the volume of charts reviewed as part of United's IDV/RACCR and CV Programs and in projecting the financial impacts of the Chart Review, CV and RACCR Programs. In addition, he made presentations about how the recoding of charts would impact the proper functioning of the CV Program. *See* Compl. ¶ 133 (discussing the Recode Project conducted by United).
Christen Connell-Reynolds – Former Optum Employee (third-party witness)	California	During part of the relevant time period, she led the Revenue Projection Team for the Risk Adjustment group at Optum. Based on documents produced by United, she may know about the financial impact of the CV Program. She also prepared the monthly financial reports that Optum's Risk Adjustment group provided to UnitedHealthcare.
Karen Griffin – Current Optum Employee	California	She was a project manager. She is knowledgeable about the RACCR program. She coordinated the retrieval and coding of charts for individual provider RACCR audits and communicated directly with providers about the audits.
Jose Fernandes (third-party witness)	California	He co-led ICE's RADAR team for several years. He is knowledgeable about CMS's Risk Adjustment Data Validation ("RADV") audits and physician training relating to CMS' medical record documentation requirement.
Ronnie Grower – Former Optum employee	Nevada	She was the Vice President of Market Consultation for Optum. Early in the relevant time period, Grower oversaw

(third-party witness)		United's participation in CMS' RADV audits. In addition, starting in or about 2007, Grower was Optum's primary contact with iCodify. She was also involved in the Optum IDV/RACCR Programs. In 2009, Grower noted that the IDV Program excluded fee-for-service providers and questioned whether there was a need for another program to address problems with diagnoses reported by these providers. *See* Compl. at ¶ 136.
Patty Hermanns (third-party witness)	Nevada	For many years, she has been the Administrative Operations Coordinator and Assistant to the Chairperson and CEO of ICE. Her duties include, among other things, overseeing ICE's website, which includes the RADAR team documents described at paragraph 87 of the Complaint and other very relevant documents. She also coordinated the ICE annual conferences at which Optum employees (*e.g.* Pam Leal) gave presentations about CMS medical record documentation and coding accuracy requirements. She likely will be called to authenticate various ICE documents.
Jim Higgins – Former Optum employee (third-party witness)	CA	He was a PacifiCare employee who trained providers on CMS' medical record documentation and accurate diagnosis coding requirements. He trained Stephanie Will on risk adjustment when she worked at PacifiCare. Additionally, he was responsible for the management of IRADS prior to Randy Myers at Optum.
Donald James – Current Optum Employee	California	In 2013, he was Director of Program Strategy for Optum. He was also responsible for Medicare Advantage program analytics. He is knowledgeable about United's CV Program. Compl. at ¶ 171. He participated in conversations about slowing down CV review. He was

		responsible for determining the revenues/risk adjustment payments from the additional diagnoses submitted by United to CMS as a result of United's Chart Review Program.
Pam Klugman (third-party witness)	California	She co-led ICE's RADAR team for many years. She is knowledgeable about CMS requirements for the submission of valid risk adjustment data. She is also knowledgeable about CMS Risk Adjustment Data Validation audits focused on California MA Plans.
John Martinez – Current Optum Employee	California	He worked on the CV Program, reporting to Patty Brennan, and later replaced Brennan as manager of the CV Program.
Ryan Maddox – Former Optum Employee (third-party witness)	Oregon	He is knowledgeable about decisions concerning the deletion of invalid diagnoses as part of the CV Program.
Mike McCarthy – Current UnitedHealthcare Medicare & Retirement Employee	California	McCarthy communicated with providers in the RACCR program regarding sample validation results and the 100% reviews. *See* Compl. at ¶ 211 (describing the 100% reviews).
Leslie McMains (third-party witness)	California	She was a member of the ICE's RADAR team. She is the CFO of two affiliated provider groups, one of which is Edinger Medical Group. Since approximately 2007, United has performed numerous medical record audits to determine if it could validate the diagnoses submitted by Edinger as part of its IDV/RACCR Programs. The validation rates were often very low. McMains has knowledge about these audits.
Carol Mendoza – Current Optum Employee	California[1]	She was the director of the risk adjustment data validation programs at Optum. She is

[1] Based on documents produced by United during the investigation of this matter, I believe that Carol Mendoza works for the Optum Santa Ana office. However, we have not been able to confirm that she resides in or near California.

		knowledgeable about the IDV/RACCR Programs.
Jeanette Mendoza – Current Optum Employee	California	She is knowledgeable about work conducted as a part of the IDV program early in the relevant time period. She later became the manager of RADV at Optum and interacted with Melissa Ferron/iCodify regarding audit results. Mendoza performed work relating to RADV audits. She also performed work relating to the RACCR Program and interacted with various medical groups in the RACCR Program.
Cynthia Polich – Current United Employee	Arizona	She was the President of the UnitedHealthcare group which managed United's MA Plans. She approved the development of the CV Program. *See* Compl. at ¶ 155. She acknowledged that United needed to improve its risk adjustment programs, including its chart review strategy. *Id*. Relator Benjamin Poehling raised concerns to Polich regarding the misallocation of resources to United's revenue generating programs, such as the Chart Review Program, notwithstanding United's obligation to address its submission of invalid diagnoses codes. *See* Relator Poehling's Second Amended Complaint at ¶ 172, 174.
Janice Redmond – Current Optum Employee	California	She was the Senior Vice President of Market Outreach for Optum's Risk Adjustment group. She is knowledgeable about the IDV/RACCR Programs. She participated in discussions about provider over-coding and whether United should audit the diagnosis codes reported by providers as part of the Chart Review Program. *See* Compl. At ¶ 137. She also expressed concerns that United was not auditing problematic diagnosis codes reported by providers. *Id*. at ¶ 138.

Connie Snyder – (third-party witness)	California	She has co-led ICE's RADAR team for many years. She is knowledgeable about CMS' RADV audits and physician training relating to CMS' medical record documentation requirement.
Kevin Sommerfield – Current Optum Employee	California	He transitioned over to Optum from PacifiCare after the acquisition. He was the Director of Provider Programs at Optum. He managed United's Chart Review Program for several years after it was created and should be have knowledgeable about chart reviews early in the relevant time period.
Carol Thompson – Current Optum Employee	California	She was a National Manager for Optum's Risk Adjustment Programs. She is knowledgeable about CMS's medical record documentation requirement for ensuring the validity of risk adjustment payments. She authored the document quoted in paragraph 120 of the Complaint. She also had responsibilities relating to United's Chart Review Program and has relevant knowledge relating to that program. She was a member of Kevin Sommerfield's early Chart Review team, and before that, Will's Risk Adjustment team, where she served as a manager of provider operations. She was also in charge of ChartSync. Later, she became the national manager for Ingenix's Risk Adjustment Programs.
Charles Tran – Former Optum Employee (third-party witness)	California	He was involved in assessing the financial impact of deleting diagnoses as part of the CV Program.
Troung-Son Vinh – Former Optum Employee (third-party witness)	California	He was the Associate Director of the Revenue Projection Team for the Risk Adjustment Group at Optum. He is knowledgeable about the projected and actual financial impacts of diagnoses added as a result of the Chart Review Program and diagnoses deleted as a result

		of the CV Program. He has knowledge about increases to the estimated number of deletes as a result of the CV Program in early 2014, a few months before the Program was terminated. He wrote the document upon which the allegations in ¶ 174 of the United States' Complaint are based. He oversaw the preparation of the monthly financial reports made by Optum's Risk Adjustment Group to UnitedHealthcare.
Karen Wagor – Former Optum Employee (third-party witness)	California	She initially worked for PacifiCare. After the acquisition, she was the Manager of the National Medical Coder Team and National Coding Trainer for Optum's Risk Adjustment group. Wagor is knowledgeable about and trained healthcare providers about CMS's medical record documentation and coding accuracy requirements to ensure the validity of risk adjustment payments. *See* Compl. at ¶ 103.
Carol Wanke (third-party witness)	California	She has presented at ICE conferences on the issues of errors in medical coding and she is knowledgable regarding CMS's medical record documentation requirement and CMS' RADV audits. Wanke is also a Vice President at Sharp HealthCare, a provider group. Wanke was Sharp's point of contact for United's RACCR Program.
Chris Webb – Former Optum Employee (third-party witness)	California	He worked for Optum's Risk Adjustment group. He monitored the operation of the CV Program.
Anita Westrup – Current United Employee	California	Until the acquisition in 2005, she worked as a VP of Information Technology at PacifiCare. In 2010, she began work working for the Encounter Operations team, which was part of Optum's Risk Adjustment group. She is knowledgeable about United's Internal Risk Adjustment

		Data System, which United used to submit diagnoses codes to CMS and delete invalid codes. She was involved in developing operational processes for United's CV Program. She supervised key witnesses who testified in the investigation, including Randy Myers and Rebecca Martin. She currently works as a Senior IT Director for UnitedHealth Group.
Grace Woo – Current Optum Employee	Nevada	She led the information analytics team at Optum. She created (or was involved in the creation of) the prevalence reports used to identify the outlier provider groups for the RACCR Program. *See* Compl. at ¶¶ 204-205 (describing outlier providers). She is knowledgeable about the processes used to develop these reports.
Kathleen "Kathi" Wylie (third party witness)	California	She co-led the ICE RADAR team for many years. She is knowledgeable about CMS' RADV audits and physician training relating to CMS' medical record documentation requirement.

16. Over the last decade, numerous Medicare beneficiaries enrolled in United's MA Plan in California were served by financially-incentivized capitated providers located in California. Many of the financially-incentivized provider groups included in United's RACCR Program are located in California. *See* Exhibit 3 to the United States' Complaint. *See also* Declaration of Maria Marsh at ¶ 4. Fifteen of these California provider groups failed United's RACCR sample reviews and neither United nor the providers reviewed all of the problematic diagnosis codes at issue in order to delete or withdraw all invalid diagnoses. *See* Compl. at ¶ 215. Three of the extreme outlier provider groups specifically discussed in the United States' Complaint are located in California, including Edinger Medical Group, HealthCare Partners and Hemet Community Medical Group. Compl. ¶¶ 219-220, 222. In this action, the United States intends to subpoena documents from various RACCR provider groups located in

California. These documents will include medical records relating to the Medicare beneficiaries in United's California MA Plan who were served by these providers.

17. Certain current and former employees of the provider groups included in the RACCR Program are knowledgeable about the RACCR audits, including, for example, the results of the sample audits and why the 100% reviews were not conducted when the providers failed the sample audits (*e.g.*, whether United even asked them to identify all invalid diagnoses). Many of these witnesses reside or work in California. Some of those witnesses who reside in California are identified in ¶ 2 of the Marsh Declaration. It is likely that the United States will call at least some of these third-party witnesses to testify if there is a trial as well as other third-party witnesses located in or near California who worked for the RACCR providers but who have not yet been identified.

Witness	State of Residency	Provider Group Affiliation
Niki Balginy	CA	High Desert Primary Care Medical Group
Lisa Cabrera	CA	Primecare
Debbie Camden	CA	Hemet Community Medical Group
Sue Erickson	CA	HealthCare Partners
Regina Green	CA	UCLA Medical Group
Bettina Lau	CA	HealthCare Partners
Denise McCourt	CA	Edinger Medical Group
Sherry Miller	CA	Redlands-Yucaipa Medical Group
Tomoko Nguyen	CA	Monarch Healthcare
Demara Nuzum	CA	Primecare
Francine Odee	CA	HealthCare Partners
Lydia Simon	CA	Edinger Medical Group
Nallu Vijayakumar	CA	HealthCare Partners
Mary Yeo	CA	Monarch Healthcare

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 25, 2017 in Washington, District of Columbia.

Carol L. Wallack

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

UNITED STATES OF AMERICA *ex rel*. BENJAMIN POEHLING,

Plaintiffs,

v.

UNITEDHEALTH GROUP, *et. al.*,

Defendants.

No. CV 16-08697 MWF (SSx)

DECLARATION OF MARIA MARSH IN SUPPORT OF THE UNITED STATES' AND RELATOR BENJAMIN POEHLING'S CONSOLIDATED OPPOSITION TO UNITED'S MOTION TO TRANSFER

Hon. Michael W. Fitzgerald
Courtroom: 5A

Hearing Date: September 25, 2017
Hearing Time: 10:00 a.m.

I, Maria Marsh, declare and state as follows:

1. I am an investigator with the United States Attorney's Office for the Central District of California, Civil Fraud Section. I have served in this role since December 11, 2016. I submit this declaration to provide background information relevant to the United States' and Relator Benjamin Poehling's Consolidated Opposition to United's Motion to Transfer. I have personal knowledge of the facts stated here and/or have verified facts using the best information available to the U.S. Attorney's Office's Civil Fraud Section.

2. Non-party witnesses in this case reside in or near the Central District of California. Specifically, to the best of my knowledge, based on searches of publicly available information, the following non-party witnesses reside in or near the Central District of California:

Witness	**State**
Niki Balginy	CA
Lisa Cabrera	CA
Debbie Camden	CA
Christen Connell-Reynolds	CA
Sue Erickson	CA
Melissa Ferron	CA
Jose Fernandes	CA
Regina Green	CA
Ronnie Grower	NV
Patty Hermanns	NV
Jim Higgins	CA
Pamela Holt	CA
Pam Klugman	CA
Bettina Lau	CA
Pamela Leal	CA
Ryan Maddox	OR
Denise McCourt	CA

Leslie McMains	CA
Sherry Miller	CA
Tomoko Nguyen	CA
Demara Nuzum	CA
Francine Odee	CA
Lydia Simon	CA
Connie Snyder	CA
Charles Tran	CA
Nallu Vijayakumar	CA
Truong-Son Vinh	CA
Karen Wagor	CA
Carol Wanke	CA
Chris Webb	CA
Kathleen "Kathi" Wylie	CA
Mary Yeo	CA

3. Party witnesses, *i.e.*, current United employees, reside in or near the Central District of California. Specifically, to the best of my knowledge, based on searches of publicly available information, the following party witnesses reside in or near the Central District of California:

Witness	**State**
Jon Bird	CA
Paul Bihm	CA
Patty Brennan	CA
Patrice Buchana	CA
Nick Chiechi	CA
Karen Griffin	CA
Donald James	CA
John Martinez	CA
Rebecca Martin	CA

Mike McCarthy	CA
Jeanette Mendoza	CA
Randy Myers	AZ
Cynthia Polich	AZ
Janice Redmond	CA
Kevin Sommerfield	CA
Carol Thompson	CA
Anita Westrup	CA
Stephanie Will	AZ
Grace Woo	NV

4. Non-party provider groups included in the RACCR program are located in or near the Central District of California. Specifically, to the best of my knowledge, based on searches of publicly available information, the following non-party provider groups are located in or near the Central District of California:

Provider Group	**State**
Access Medical Group Inc.	CA
Adventist Health	OR
Alliance Physicians Medical Group	CA
Applecare Medical Group	CA
Axminster Medical Group	CA
Affinity Medical Group	CA
Bakersfield Family Medical Center	CA
Beaver Medical Group	CA
Beaver/Redlands-Yucaipa Medical Group	CA
Cassidy Medical Group	CA
Choice Medical Group	CA
Choice Physicians Network	CA
Coastal Communities Physician Network	CA
Desert Oasis Healthcare	CA

Edinger Medical Group	CA
Encompass Medical Group Inc	CA
Facey Medical Foundation	CA
Family Practice Medical Group	CA
Greater Newport Physicians	CA
Greater Tri-Cities IPA Medical	CA
HealthCare Partners	CA
Hemet Community Medical Group	CA
Heritage Physicians Network	CA
High Desert Medical Group	CA
High Desert Primary Care Medical Group	CA
Highline Medical Services Organization	WA
Heritage Victor Valley Medical Group	CA
Imperial City County Physicians Medical Group	CA
Lakeside Medical Group	CA
Menifee Valley Community Medical Group	CA
Mercy Physicians Medical Group	CA
Monarch Healthcare	CA
Northwest Primary Care Group	OR
Pacific Independent Practice Association	CA
Palo Alto Medical Foundation	CA
Primecare	CA
Prospect Medical Group	CA
Regal Medical Group	CA
San Bernardino Medical Group	CA
San Jose Medical Group	CA
Santa Barbara Select IPA	CA
Santa Clara County IPA	CA
Sharp Community Medical Group	CA
Sharp Rees-Stealy Medical	CA

San Luis Obispo Select Independent Practice Association	CA
Southwest Medical Associates	NV
St. Vincent Medical Group IPA	CA
Talbert Medical Group	CA
UCLA Medical Group	CA
United Family Care	CA
Valley Care IPA	CA

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 25, 2017 in Los Angeles, California.

MARIA MARSH